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IN THE
# Supreme Court of the United States

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DEWEY J. JONES,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF AMICUS CURIAE FOR DALE LYNN RYAN IN SUPPORT OF PETITIONER

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## BRIEF AMICUS CURIAE FOR DALE LYNN RYAN IN SUPPORT OF PETITIONER

## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus Dale Lynn Ryan has an undeniable interest in the proper resolution of the question presented by this case: he is serving a sentence in federal prison in Oklahoma for his conviction—now on collateral review pursuant to 28 U.S.C. § 2255—of one count of destroying by fire a "building * * * used in * * * any activity affecting interstate * * * commerce," in violation of 18 U.S.C. § 844(i). The building in Mr. Ryan's

[1]Pursuant to S. Ct. Rule 37.6, amicus states that no counsel for any party to this case authored this brief in whole or in part and no person or entity other than amicus and his family made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk.

case bore perhaps an even more attenuated link to interstate commerce than the one in this case.

When it was destroyed, the building in Mr. Ryan's case—which at one time had been a fitness center—was permanently closed, was not being used for any business purpose, and was not for sale or rent. After thoroughly investigating the fire, state and local authorities declined to bring charges. A year and a half later, however, federal authorities brought a one-count indictment against Mr. Ryan under Section 844(i)—the federal arson statute. To establish federal jurisdiction, the government argued that the building was *either* owned by an out-of-state resident, *or* supplied with natural gas from outside the State. That was enough—according to the prosecution—to give rise to a federal offense under Section 844(i).

Mr. Ryan was convicted and sentenced to 27 and 1/2 years imprisonment. A divided panel of the Court of Appeals for the Eighth Circuit affirmed the conviction. But the Eighth Circuit vacated that decision, and reheard the case en banc. By the slimmest margin (6-5), the en banc court affirmed. The dissent concluded that neither of the asserted connections with interstate commerce established that the building was "used" in an "activity" affecting interstate commerce, as Section 844(i) requires. Quite the contrary. The building was simply "cumbering the ground." *United States* v. *Ryan*, 41 F.3d 361, 369 (8th Cir. 1994) (Arnold, C.J., joined by McMi[illegible]n, Gibson, and Magill, JJ.), *cert. denied*, 514 U.S. 1082 (1995).[2]

Mr. Ryan's participation as an amicus in this case will provide the Court with a broader perspective on the sweeping manner in which Section 844(i) has been applied—including to property that is not strictly residential in character. Because his

[2]Judge Loken also dissented. He agreed with the four other dissenters that the jury instruction on the requisite nexus with interstate commerce under Section 844(i) was plainly erroneous, but wrote separately. *See* 41 F.3d at 370.



conviction remains on collateral appeal, he has a compelling interest in seeing that the Court takes this opportunity to limit Section 844(i) to its congressionally intended—not to mention constitutionally permissible—reach.

## SUMMARY OF ARGUMENT

To establish the proper reach of Section 844(i), the Court need go no further than the text of the statute itself. First, Section 844(i) potentially covers the arson of "any building" and, thus, precludes any categorical distinction between residential or commercial buildings. Second, while no particular type of building is excluded, Section 844(i) only applies to buildings that are "used" in an "activity" affecting interstate commerce. This significantly limits the reach of Section 844(i) because it requires that the building itself be *actively employed* in an activity affecting interstate commerce. A passive, passing, or past connection with interstate commerce—such as the fact that a building is heated with natural gas from outside the State—does not suffice. In common parlance, private homes ordinarily are not "used" in an "activity" affecting interstate commerce, and thus typically are not covered by Section 844(i). That is true with respect to the residence in this case.

Construing Section 844(i) to cover any building with such an attenuated connection with interstate commerce as the fact that it receives natural gas from another State would extend the statute to practically every building in the land. That, in turn, would cast serious doubt on the constitutionality of the statute, which this Court should seek to avoid. As this Court recently observed in *United States* v. *Lopez*, 514 U.S. 549, 561 n.3 (1995) (quotations omitted), "[u]nder our federal system, the States possess primary authority for defining and enforcing the criminal law." This Court, accordingly, should be especially wary of construing federal statutes in a way that would criminalize purely local offenses—such as simple arson—that have for centuries been policed exclusively by the States.

Because the federal government lacks the authority to act as the neighborhood cop, Section 844(i) must be tested under Congress' power "[t]o regulate commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3. As *Lopez* underscores, the commerce power is broad but not absolute. When, as here, Congress is not regulating the channels or instrumentalities of interstate commerce, its commerce power is limited to activities that "*substantially* affect interstate commerce." 514 U.S. at 559 (emphasis added). As a result, Section 844(i) cannot—as a constitutional matter—be applied to buildings that have only de minimis connections with interstate commerce.

The fact that Section 844(i) contains a jurisdictional element requiring a case-by-case inquiry into the effect on interstate commerce does not free the statute from this constitutional tether. To save a statute that would otherwise exceed Congress' commerce power, a jurisdictional element must be meaningful. For Section 844(i), this means the government must prove that the building was used in an activity that had a substantial effect on interstate commerce. Any other conclusion would eliminate the "distinction between what is truly national and what is truly local," give the federal government free reign in an area—"criminal law enforcement"—over which "the States historically have been sovereign," 514 U.S. at 564, 567-568, and all but read a Criminal Affairs Clause into Article I. In any event, the Court can avoid any constitutional infirmity by simply construing Section 844(i) according to its terms.

## ARGUMENT

### I. BY ITS TERMS, SECTION 844(i) ONLY APPLIES TO THE ARSON OF BUILDINGS "USED" IN AN "ACTIVITY" AFFECTING INTERSTATE COMMERCE, AND THUS ORDINARILY DOES NOT EXTEND TO PRIVATE HOMES.

1. As with any statute, the starting point in determining the reach of Section 844(i) is the language of the statute itself. *See Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). Section 844(i) provides in pertinent part: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building * * * used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned * * *." 18 U.S.C. § 844(i). The statute's reach is accordingly grounded expressly on the *use* of the property destroyed by arson. Two principles inform that jurisdictional determination.



a. First, all *types* of buildings can qualify under Section 844(i), since the statute potentially covers the arson of "any building." *Id. See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *Webster's Third New International Dictionary* 97 (1976)). As a result, Section 844(i) precludes any sort of categorical distinction between residential and commercial buildings. In fact, in enacting Section 844(i), Congress specifically revised an earlier version of the bill "to eliminate the words 'for business purposes' from the description of covered property." *Russell* v. *United States*, 471 U.S. 858, 861-862 (1985) (quoting draft bill). *See id.* at 862 & nn.5-7 (discussing legislative history); *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended").[3]

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[3]During the hearings on the proposed bill, Department of Justice officials testified that the provision was intended to reach only property used for business purposes. *See Explosives Control: Hearings on H.R. 17154, H.R. 16699, H.R. 18573 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 73-74 (1970) (testimony of W. Wilson and M. Abbell). Other witnesses testified that the provision should not be confined to property used for business purposes, urging instead that it be expanded to cover the arson of schools, churches, police stations, and even private homes. *See id.* at 78-79 (Rep. Smith), 289 (Rep. Goldwater), 300 (Rep. Wylie). The subcommittee deleted the phrase

b. Second, while no specific type of building is necessarily beyond the reach of Section 844(i), "the statute *only* applies to property that is 'used' in an 'activity' that affects commerce." *Russell*, 471 U.S. at 862 (emphasis added).[4] As this Court has recognized, while "variously defined," the word "use" ordinarily connotes "action and implementation," or "active employment." *Bailey* v. *United States*, 516 U.S. 137, 143, 145 (1995). *See Smith* v. *United States*, 508 U.S. 223, 229 (1993) ("'to use'" means "'to convert to one's service' or 'to employ'") (quoting dictionary); *see also Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). Section 844(i) thus requires that the building itself be actively employed in—if not converted to the service of—an activity affecting interstate commerce; a building's passive, passing, or past connection with interstate commerce does not suffice.

Judge Friendly put it this way:

> The critical word here is "used." Congress did not define the crime described in § 844(i) as the explosion of a building whose damage or destruction might affect interstate commerce as we assume it could constitutionally have done. *It chose to require that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce.* [*United States* v. *Mennuti*, 639 F.2d 107, 110 (2d Cir. 1981) (emphasis added).]

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"used for business purposes" and Congress enacted Section 844(i) without it.

[4]Section 844(i) applies to "any building * * * used [1] in interstate or foreign commerce or [2] in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (brackets added). In construing the reach of Section 844(i), this Court and the lower courts have focused on the latter clause because—due to the "affecting" interstate commerce language—the latter clause is broader than the first. *See United States* v. *American Bldg. Maintenance Indus.*, 422 U.S. 271, 279-280 (1975). Accordingly, we focus on the reach of the latter clause here.



To the extent there is any uncertainty over the significance of "used," "the remainder of [Section 844(i)] appropriately sets it to rest." *Smith* v. *United States*, 508 U.S. at 233. *See also King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). As the Court recognized in *Russell*, 471 U.S. at 862, Section 844(i) provides that the building must be "'used' in an 'activity' that affects commerce." "Activity" is commonly defined as "[t]he state of being active." *Webster's II New College Dictionary* 12 (1995). The use of "activity" in close conjunction with "used" underscores that Congress intended to limit Section 844(i) to buildings *actively employed* in—not simply in some way connected to—interstate commerce. Moreover, while Congress has included an interstate commerce-nexus requirement in several criminal statutes, Section 844(i) is apparently unique in establishing this "active employment in interstate commerce" requirement.

2. Applying these textual principles to the instant case compels the conclusion that Section 844(i) does not extend to the building at issue. First, the fact that the building is a private residence does not automatically exclude it from Section 844(i). Even a home may be "used" in an "activity" affecting interstate commerce; for example, many people use their homes—and for tax purposes declare them—as a home office. But the typical activity for which a home is used is "daily living"—not interstate commerce. *United States* v. *Ramey*, 24 F.3d 602, 610 (4th Cir. 1994) (Michael, J., concurring in part and dissenting in part), *cert. denied*, 514 U.S. 1103 (1995). There is no evidence that the home in this case was used for anything but "daily living." In holding that the residence was nevertheless covered by Section 844(i), the Court of Appeals pointed out that "the owner of the residence purchased natural gas in interstate commerce, secured a mortgage from an out-of-state lender, and received an insurance check from an out-of-state insurer." Pet.

App. 2a.[5] But in plain English neither natural gas consumption nor being mortgaged or insured is an *activity* for which a home is *used*.

As the Court of Appeals acknowledged, moreover, "these interstate connections are pretty slight." *Id.* They are scarcely more probative in establishing that the building is used in an activity affecting interstate commerce than is the fact that the owner who sleeps there happens to be a traveling salesman. Perhaps such links would establish "that the quantum of commerce might differ if the dwelling had never been built, were destroyed or were rebuilt." *Mennuti*, 639 F.2d at 110. But that "is not enough under the statute." *Id.* Section 844(i) "require[s] that the damaged or destroyed property must *itself* have been used in commerce or in an activity affecting commerce." *Id.* (emphasis added). "The pictures summoned up by these words include such things as railroad stations, bus depots, airport buildings, and factories," as well as offices in which business is transacted across state lines and "hotels and restaurants." *See id.* at 109. Not the house next door.

*Russell* does not compel a contrary construction. The building in that case was a "two-unit apartment building that is used as rental property," and "treated [by the owner] as business

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[5] In finding the requisite nexus with interstate commerce present, the Court of Appeals also relied on the effect that arson has on commerce each year on a *nationwide* basis. Pet. App. 3a. Whether or not such an "aggregation" analysis squares with this Court's current Commerce Clause jurisprudence, which we discuss in Part II, *infra*, the analysis does not accord with the inquiry called for by the statute. As discussed, Section 844(i) makes coverage dependent on whether the *building itself* giving rise to the offense is "used" in an "activity" affecting interstate commerce, not whether arson in general has an aggregate effect on interstate commerce. *See United States* v. *Gomez*, 87 F.3d 1093, 1096 (9th Cir. 1996) ("According to the plain language of the statute, the interstate commerce aspect of the crime is distinct from the arson—*it depends solely on what the property had been used for* (or whether the property was moving in interstate commerce).") (emphasis added).



property for tax purposes." 471 U.S. at 858-859. While the Court recognized that Section 844(i) "only applies to property that is 'used' in an 'activity' that affects commerce," it found that "[t]he rental of real estate is unquestionably such an activity." *Id.* at 862. The building in this case is not used in any comparable activity. In *Russell* the United States argued—as a first and independent reason why Section 844(i) applied —that "[t]he building was heated by gas that moved in interstate commerce." Br. for United States in No. 84-435, at 6; *see id.* 15-16. But the *Russell* Court ignored this argument. Moreover, the *Russell* Court specifically acknowledged that while Section 844(i) may have a broad reach, it was unlikely that it covered "every private home." 471 U.S. at 862. It does not cover the private home here, which—quite unlike the apartment building in *Russell*—was not used in the interstate rental market, or in any other activity affecting interstate commerce.[6]

Practically every building is built with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by institutions that do business across state lines, or bears some other trace of interstate commerce. If that is enough to trigger Section 844(i), then the statute has no limit at all, and thus authorizes the federal government to police offenses—like the burning of the private dwelling in this case—that historically have been dealt with by the local constable. That result no doubt would strike some—the Framers come to mind—as absurd. *See Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 & n.3 (1993) (a "common mandate of statutory construction [is] to avoid absurd results"); *cf.* Henry J. Friendly, *Federal Jurisdiction: A General View* 61

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[6] In *Mennuti* Judge Friendly observed that "the fact that a dwelling was *advertised* for rental" would not be sufficient to trigger Section 844(i). 639 F.2d at 110 (emphasis added). But he did not reach the question decided in *Russell*. While some courts have questioned the reasoning of *Mennuti* following *Russell*, Judge Friendly's reading of Section 844(i) remains as forceful today as the day *Mennuti* was decided.

(1973) ("The Founding Fathers, I think, would have been surprised to find the federal courts trying cases of corruption in the New York City administration simply because one of the participants had rowed across the Hudson in the course of the criminal venture."). But more important, this open-ended construction of Section 844(i) casts doubt on the constitutionality of the statute, which this Court should avoid.

## II. ANY DOUBT ABOUT THE REACH OF SECTION 844(i) TO THE ARSON OF BUILDINGS, SUCH AS THE ONE IN THIS CASE, WITH ONLY ATTENUATED TIES TO INTERSTATE COMMERCE SHOULD BE AVOIDED BY CONSTRUING THE STATUTE IN LIGHT OF *UNITED STATES* v. *LOPEZ*.

1. "It is a familiar principle of our jurisprudence that federal courts will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible by which the constitutional question can be avoided." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7 (1993). *See Edward D. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *United States* v. *Five Gambling Devices*, 346 U.S. 441, 448 (1953) (Opinion of Jackson, J.). As explained next, the Court of Appeals' construction of Section 844(i)—which would extend the statute to practically every building in America—would result in the conclusion that Congress has exceeded its Commerce Clause authority and, in doing so, intruded into an area in which the "States historically have been sovereign." *United States* v. *Lopez*, 514 U.S. at 564.

2. In *Russell*, 471 U.S. at 859, this Court observed without extended analysis that in enacting Section 844(i) Congress intended "to exercise its full power under the Commerce Clause." That conclusion does not follow from the plain meaning interpretation discussed in Part I, *supra*, or, indeed, from the interpretation reached by the *Russell* Court itself. *See* 471 U.S. at 862 ("By its terms, * * * the statute *only* applies to property that is 'used' in an 'activity' that affects commerce.")



(emphasis added). But even assuming Congress intended Section 844(i) to have the furthest constitutional reach, that does not end the inquiry here. As the pathbreaking *Lopez* decision underscores, "the power to regulate commerce, though broad indeed, has limits that the Court has ample power to enforce." 514 U.S. at 557 (quotations and brackets omitted). These limits are critical to the "federal balance" that is an "essential * * * part of our constitutional structure," and "vital" to "securing [the] freedom" bequeathed by our forebears. *Id.* at 575, 578 (Kennedy, J., joined by O'Connor, J., concurring).

a. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Id.* at 561 n.3 (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 635 (1993); *Engle* v. *Isaac*, 456 U.S. 107, 128 (1982)). *See Lopez*, 514 U.S. at 564 ("States historically have been sovereign" in the area of "criminal law enforcement"); *Abbate* v. *United States*, 359 U.S. 187, 195 (1959) ("principal responsibility for defining and prosecuting crimes" resides with the States); *Screws* v. *United States*, 325 U.S. 91, 109 (1945) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.") (Opinion of Douglas, J.). That is certainly true when it comes to the common law offense of arson.

The offense of arson has been around nearly as long as the wooden dwelling; it spread to America with the colonists; and it has been codified by the States since the time of our founding. *See generally* John W. Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295 (1986); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). Congress did not attempt to "federalize" arson until almost two hundred years after the founding, when it enacted Section 844(i) as part of

Title XI of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1102.[7] When Congress did so, "it effect[ed] a change in the sensitive relation between federal and state criminal jurisdiction." *Lopez*, 514 U.S. at 561 n.3 (quotations omitted). And if Section 844(i) was in fact intended to have the sweeping construction given to it by the Court of Appeals below, Congress overstepped its Article I bounds.

b. Article I has no Criminal Affairs Clause. Instead, it enumerates specific offenses—such as "counterfeiting," U.S. Const. art. I, § 8, cl. 5—that Congress is authorized to punish.[8] Based on the Constitution's text and structure—as well as the fact that "States historically have been sovereign" in the area of "criminal law enforcement"—this Court has held that the Constitution "*withhold[s]* from Congress a plenary police power." *Lopez*, 514 U.S. at 564, 566 (emphasis added). *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 428 (1821) (it is "clear[] that Congress cannot punish felonies generally"). That power was reserved to the States. As a result, Congress' authority to make a federal offense out of arson (or any other offense not enumerated in Article I) must stem from its authority "[t]o regulate

[7] Prior to the enactment of Section 844(i)—which initially applied only to buildings damaged or destroyed by "explosive[s]," but was broadened in 1982 to cover buildings harmed by "fire"—the federal law of arson was limited to uniquely federal concerns, *e.g.*, federal territories and Indian reservations, federal buildings, and admiralty. *See* Thomas J. Egan, *The Jurisdictional Element of 18 U.S.C. § 844(i), A Federal Criminal Commerce Clause Statute*, 48 Wash. U.J. Urb. & Contemp. L. 183, 194-197 (1995).

[8] Article I empowers Congress to punish "counterfeiting," U.S. Const. art. I, § 8, cl. 5, "Piracies and Felonies committed on the high Seas," *id.* art. I, § 8, cl. 10, and "Offenses against the law of nations." *Id.* In addition, Article III establishes the federal offense of "treason." *Id.* art. III, § 3. The fact that the Framers singled out specific criminal offenses for federal legislation or attention provides further indication that they did not intend to give Congress the authority to federalize what amount to local criminal offenses.



commerce * * * among the several States." U.S. Const. art. I, § 8, cl. 3.

As this Court explained in *Lopez*, the commerce power authorizes Congress to enact three classes of legislation:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce * * *. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. [514 U.S. at 558-559 (citations omitted).]

As was true with respect to the statute in *Lopez*, Section 844(i) does not fall into either of the first two categories. "Thus, if [Section 844(i)] is to be sustained, it must be under the third category as a regulation of an activity that *substantially* affects interstate commerce." *Id.* at 559 (emphasis added).

In the third category, the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where * * * the activity substantially affected interstate commerce." *Id.* The high-water mark is *Wickard* v. *Filburn*, 317 U.S. 111 (1942), which involved the regulation of the production and use of homegrown wheat; other "[e]xamples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests." *Lopez*, 514 U.S. at 559 (citations omitted). Each of these examples involved regulation of "*economic* activity * * * substantially affect[ing] interstate commerce." *Id.* at 560 (emphasis added). As was true for the criminal statute challenged in *Lopez*, *see id.* at 561, the conduct proscribed by Section 844(i)—arson—"has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id. See*

*United States* v. *Pappadopoulos*, 64 F.3d 522, 526 (9th Cir. 1995).[9]

c. Unlike the statute struck down in *Lopez*, Section 844(i) contains a jurisdictional element requiring an individualized inquiry into the effect on interstate commerce in each case. As discussed, to trigger Section 844(i) the government must prove that the building was "used" in an "activity" affecting interstate commerce. Some lower courts have pointed to Section 844(i)'s jurisdictional element and—in talismanic fashion—simply thrown *Lopez* to the wind. *See, e.g., United States* v. *Sherlin*, 67 F.3d 1208, 1213-14 (6th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996). But while the inclusion of a jurisdictional element may save an otherwise *ultra vires* statute, the element itself must have constitutionally meaningful content.

Put somewhat differently, "[a] jurisdictional element by itself cannot save a statute that exceeds congressional authority. The jurisdictional element must in some way be meaningful, and the Supreme Court has specified a condition for meaningfulness in its substantial effects test." *United States* v. *Hickman*, 179 F.3d 230, 240-241 (5th Cir. 1999) (Higginbotham, J., joined by Jolly, Jones, Smith, Duhe, Barksdale, E. Garza, and DeMoss, JJ., dissenting from equally divided affirmance of conviction for local robberies under Hobbs Act), *pet. for cert. filed*, 68 U.S.L.W. 3178 (Sept. 16, 1999) (No. 99-464). *See also United States* v. *Harrington*, 108 F.3d 1460, 1467 (D.C. Cir. 1997) ("*Lopez* reminds us that statutory jurisdictional elements must be taken seriously * * *. Only in that way can these statutory provisions serve their intended purpose of protecting the *Lopez* Court's 'first principles'") (quoting *Lopez*,

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[9] While the Court need not go so far to decide this case, Congress' Commerce Clause power arguably does not extend to the type of criminal conduct regulated by Section 844(i) on the ground that it is not "commerce" in the first place. *See Gibbons* v. *Ogden*, 22 U.S. (9 Wheat) 1, 193 (1824) (essence of commerce is "commercial intercourse"); *Lopez*, 514 U.S. at 585-588 (Thomas, J., concurring).



514 U.S. at 552); William Brian Gaddy, *A Review of Constitutional Principles to Limit the Reach of Federal Criminal Statutes*, 67 U.M.K.C. L. Rev. 209, 218 n.73 (1999) (unless given teeth, "a jurisdictional element is only constitutional 'window dressing'").

For Section 844(i), this means that in establishing that a building is "used" in an "activity" affecting interstate commerce—and, thus, covered—the government must prove *more* than that the building has a de minimis connection with commerce. "[T]he government must * * * point[] to a 'substantial' effect on or connection to interstate commerce." *Pappadopoulos*, 64 F.3d at 527. *Accord United States* v. *Denalli*, 73 F.3d 328, 330 (11th Cir. 1996); *see also United States* v. *Nguyen*, 117 F.3d 796, 799 (5th Cir. 1997) ("The substantial effects test articulates the limit" of Section 844(i)'s jurisdictional reach) (Jones, J., dissenting), *cert. denied*, 522 U.S. 987 (1997). Even the Court of Appeals below acknowledged that this threshold cannot be satisfied on the record here. *See* Pet. App. 2a (the alleged "interstate connections * * * don't establish a 'substantial' connection between this arson (or this residence) and interstate commerce").

Lowering the bar to require merely the type of attenuated ties with interstate commerce asserted in this case would erase the "distinction between what is truly national and what is truly local," *Lopez*, 514 U.S. at 567-568, and permit the federal government to assume essentially the same role as the States in policing local crime. *Cf. A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 554 (1935) ("There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce.") (Cardozo, J., concurring). Simple robbery, burglary, or arson could all be "federalized," with the caveat that the government need show an individualized connection—however slight or far-flung—with interstate commerce. That is no limit at all on the federal authority enumerated in Article I.

Invariably, the building destroyed by arson will be built with materials from out-of-state, the goods (or money) stolen from the victim's bag will have traveled in interstate commerce, or the window pane broken by the burglar will have been made of glass from outside the State. "In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). There is no reason to do so here.

The *Wickard* line cannot be extended—further—to legitimize the prosecution in this case. In those cases, the Court held that "[w]here *economic activity* substantially affects interstate commerce" in the aggregate, "legislation regulating that activity will be sustained," even where individual instances of the regulated activity have only a remote effect on interstate commerce. *Lopez*, 514 U.S. at 560 (emphasis added). In this case as in *Lopez*, by contrast, the activity being regulated by Congress—arson—is not "an essential part" of any "larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* at 561; *see* note 9, *supra*. Indeed, the regulated conduct is not economic at all. The regulation of such non-economic activity stands on different constitutional footing and, at a minimum, is not entitled to review under the sweeping *Wickard* rationale.

Unlike interstate commerce, arson is not singled out for federal regulation in Article I. Quite the contrary. "Under our federal system, *the States* possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 n.3 (quotations omitted; emphasis added). The historical—not to mention constitutional—role reserved to the States for policing local crime should resolve any doubt that Section 844(i)'s jurisdictional element must be given teeth.[10]

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[10]This Court's per curiam decision in *United States* v. *Robertson*, 514 U.S. 669 (1995), is not to the contrary. There, the Court upheld a federal RICO conviction under 18 U.S.C. § 1962(a), which, *inter alia*, prohibits investing the proceeds of unlawful activities in "any enterprise engaged in, or the activities of which affect, interstate or foreign commerce." The evidence in that case showed that the defendant had invested narcotics proceeds in an Alaskan gold mine. While prohibited by federal law, the investment of such proceeds was an economic activity. Moreover, the evidence showed that as part of his illegal investment scheme the defendant bought and transported goods in interstate commerce. As a result, the Court was able to conclude unanimously that the defendant and his mine were "engaged in" interstate commerce. *See id.* at 671-672. The evidence of commerce in *Robertson* was so abundant that the Court's brief per curiam decision does not begin to probe the more difficult constitutional issues presented by the conviction—and statute—challenged here.



d. In considering the reach of Section 844(i), the Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Lopez*, 514 U.S. at 580 (Kennedy, J., joined by O'Connor, J., concurring). Here as in *Lopez*, that inquiry must be answered in the affirmative. State and local governments have for centuries policed the type of neighborhood arson giving rise to this case. Moreover, if given the sweeping construction embraced by the Court of Appeals below, Section 844(i) would contribute to the broad federalization of local crimes. *See* Greg Hollon, *After the Federalization Binge: A Civil Liberties Hangover*, 31 Harv.C.R.-C.L.L. Rev. 499, 499 (1996) ("Since the 1970s, Congress has vastly increased the federal government's jurisdiction over crime" by "criminaliz[ing] a variety of activities traditionally considered to be purely state matters."); Task Force on the Federalization of Criminal Law, American Bar Ass'n, *Federalization of Criminal Law* 7-9 (1998) (same).[11]

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[11] "Prior to the Civil War, only a small number of federal offenses existed"—typically related to matters of unique federal concern—"and there was little if any overlap between the offenses subject to federal and state prosecution." Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 981 n.11 (1995). The number of federal offenses grew with the expansion of federal power after the Civil War, blossomed in the New Deal

The effect of this trend on the federal balance is not simply palpable, it is alarming. As the Head of the Federal Judiciary recently admonished, the federalization of criminal law "threatens to change entirely the nature of our federal system." William H. Rehnquist, *1998 Year-End Report on the Federal Judiciary* 4 (1999). *See also* William H. Rehnquist, *Seen in a Glass Darkly: The Future of Federal Courts*, 1993 Wis. L. Rev. 1, 6 (1993) ("Most federal judges have serious concerns about the numbers and types of crimes now being funnelled into the federal courts."). Indeed, "the intrusion on state sovereignty" effected by the Gun-Free Schools Zone Act of 1990 held unconstitutional in *Lopez* was itself "significant." 514 U.S. at 583 (Kennedy, J., joined by O'Connor, J., concurring). The same goes for the intrusion perpetrated by Section 844(i), when applied in the manner challenged below.[12]

As a matter of statutory construction, this threat also counsels in favor of limiting Section 844(i) to its terms. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United*

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Era, and flourished again in the 1960s and 70s. *See* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1137-45 (1995). Today, there are "more than 3,000 federal crimes on the books." Brickey, *supra*, at 1135 n.1.

[12] The federalization of local criminal offenses imposes other "serious costs." Andrew Weis, *Commerce Clause in the Cross-Hairs: The Use of* Lopez*-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1439 (1996). For example, "new federal crimes further burden an already overburdened federal judicial system," and create "serious inequities among similarly situated defendants," due to the different procedural protections that defendants enjoy in state versus federal court and the different sentencing ranges that exist for the same crime depending on whether it is prosecuted in federal or state court. *Id.* This results in a "cruel lottery," in which some defendants are singled out for federal prosecution and subjected to harsher penalties. *Id.* at 1439 n.48. Another collateral cost of—and objective indication of—the federalization of local crimes is the dramatic increase in the federal prison population in the past few decades. *See* Gaddy, *supra*, at 209 n.3.



*States* v. *Bass*, 404 U.S. 336, 349 (1971). As this Court has recognized on numerous occasions, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Id.* at 349 n.16 (citing cases). As a result, the Court will not "assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction" without a "clear statement" to that effect. *Id.* The absence of any such clear statement in Section 844(i) is all the more reason to construe the statute in a manner that would avoid all constitutional doubt.

* * *

"'The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *Lopez*, 514 U.S. at 552 (quoting *The Federalist No. 45* at 292-293 (C. Rossiter ed. 1961)). The question whether Congress has stepped over the line of permissible regulation of interstate commerce into regulation of an area—such as criminal law enforcement—in which the States have historically been sovereign "is necessarily one of degree." *Lopez*, 514 U.S. at 566 (quotations omitted). But in this case, construing Section 844(i) to reach the type of simple arson prosecuted below would all but extinguish the line between federal and state power.

## III. NEITHER SECTION 844(i) NOR THE CONSTITUTION COUNSELS IN FAVOR OF ADOPTING A LIMITING PRINCIPLE BASED SOLELY ON WHETHER OR NOT A BUILDING MAY BE CHARACTERIZED AS RESIDENTIAL.

In most cases, a proper construction of Section 844(i) will preclude federal prosecution for the arson of a private home. That is plainly so here. But in deciding this case, the Court should avoid adopting any limiting principle based solely on whether or not a building is residential. Such a principle would be flatly inconsistent with Section 844(i), which—as discussed—potentially covers "*any* building" meeting the statutory

criteria. 18 U.S.C. § 844(i) (emphasis added). Indeed, given the legislative history of Section 844(i), adopting a residential/commercial distinction for determining what buildings are covered would resurrect the "discarded draft" of the statute. *See supra* at 5; *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993) (In construing a statute, "[w]e are directed by [its] words, and not by the discarded draft.").

Moreover, while private residences are ordinarily not covered by Section 844(i), there may be exceptions. Some homes —like those with prototypical home offices—may well be used in an activity affecting interstate commerce, and thus be covered by Section 844(i). Conversely, not all non-residential buildings are automatically covered by Section 844(i). Mr. Ryan's case is a good example. As noted, he was prosecuted under Section 844(i) for destroying a building that—while previously a fitness center—was at the time of the fire permanently closed, not serving any business function, and not for sale or rent. In short, the building "was not being 'used' in any 'activity'" at all; it "was just cumbering the ground." *United States* v. *Ryan*, 41 F.3d at 369 (dissent). Accordingly, while the building giving rise to Mr. Ryan's conviction may not have been residential, it nevertheless falls outside the reach of Section 844(i) under the statutory and constitutional analysis set forth above. *See also Mennuti*, 639 F.2d at 113 (Section 844(i) is "limited [in] its reach to property *currently* used in commerce or in an activity affecting it, leaving other cases to enforcement by the states") (emphasis added).

Furthermore, Congress' Commerce Clause power does not fluctuate based solely on whether or not property is residential in character. "[T]he proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, 514 U.S. at 559. Of course, the residential or commercial character of the property whose use is being regulated (or protected) by Congress may bear on the question whether Congress has properly exercised its Commerce Clause



authority. But that is "neither the beginning nor the end of this Court's inquiry." *United States* v. *Salvucci*, 448 U.S. 83, 91 (1980). Few would contend, for example, that Congress could criminalize the damage or destruction of neighborhood lemonade stands; on the other hand, Congress' commerce power almost certainly extends to private homes with home offices used to conduct interstate business. In deciding this case, the Court should avoid adding another wrinkle to an already "[un]clear" area of law (*Lopez*, 514 U.S. at 559) by holding that the constitutional reach of Section 844(i) depends solely on whether or not a building is residential in character.[13]

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[13] Eschewing a commercial/residential distinction in construing Section 844(i) also accords with the approach taken at common law. At common law, arson—like burglary—only applied to the "dwelling house," or inhabited home. Poulos, *supra*, at 300. Litigation arose over whether a building was covered as a dwelling house. *Id.* at 300-303 & n.20. In resolving that question, "it was not the character of the building, such as the distinction between a commercial and a single family residence, but its use as a home that was important." *Id.* at 307. Thus, "[t]hough it was not arson at common law to maliciously burn shops, stores, warehouses, barns, and similar buildings * * *, such buildings were the subject of arson when a portion of the building was someone's dwelling house." *Id.* at 306-307.

Section 844(i)—like most state arson statutes—eliminates the common law "dwelling house" requirement. But it operates in a similar fashion. By its terms, the determination whether a building is covered by Section 844(i) it is not based on whether it is residential or commercial in character, but rather on whether it is "used" in an "activity" affecting interstate commerce. 18 U.S.C. § 844(i).

## CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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